

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HELGA GLOCK,)
)
Plaintiff,)
)
-vs-) Case No. 1:14-CV-3249-TWT
)
GASTON GLOCK, SR., et al.,) March 18, 2015
) Atlanta, Georgia
Defendants.) 11:00 a.m.
_____)

TRANSCRIPT OF THE MOTIONS HEARING
BEFORE THE HONORABLE THOMAS W. THRASH, JR.,
U.S. DISTRICT COURT JUDGE

APPEARANCES OF COUNSEL:

On behalf of the Plaintiff: John Da Grosa Smith
Kristina M. Jones
SMITH HORVATH, LLC

On behalf of the Defendants: Tiana S. Mykkeltvedt
Ronan P. Doherty
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*Proceedings recorded by mechanical stenography
and computer-aided transcript produced by*

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1 (Proceedings held in Atlanta, Georgia, March 18,
2 2015, 11:00 a.m., in open court.)

3 THE COURT: All right. This is the case of Helga
4 Glock versus Gaston Glock, Sr. and others, Case Number
5 14-CV-3249.

6 First let me ask counsel for the parties to identify
7 yourselves for the record and the parties you represent
8 beginning with the Plaintiff.

9 MR. SMITH: Morning, Your Honor. John Da Grosa Smith
10 on behalf of Plaintiff Helga Glock.

11 THE COURT: Morning, Mr. Smith.

12 MS. JONES: Kristina Jones for Plaintiff Helga Glock.

13 THE COURT: Good morning, Ms. Jones.

14 MR. DOHERTY: Morning, Your Honor. Ronan Doherty on
15 behalf of Glock, Inc.; Consultinvest; Karl Walter; Fitox; and
16 that is it -- and Glock Hong Kong. Excuse me.

17 THE COURT: Good morning, Mr. Doherty.

18 MS. MYKKELTVEDT: Tiana Mykkeltvedt on behalf of the
19 same Defendants.

20 THE COURT: Good morning, Ms. Mykkeltvedt.

21 All right. This is a hearing on two motions. The
22 first is the Plaintiff's motion for discovery of the *In Re HMG*
23 production.

24 Mr. Smith, that's your motion; so I will hear from
25 you first.

1 MR. SMITH: Morning, Your Honor.

2 Are we prepared to address both of the pending
3 motions, the *In Re HMG* as well as the --

4 THE COURT: Well, I think my preference would be to
5 do them separately. But, yes, I am going to hear both the
6 motions this morning.

7 MR. SMITH: Does the Court have a preference for
8 which we begin with?

9 THE COURT: No.

10 MR. SMITH: If I could begin, Your Honor, with the
11 motion to preserve testimony for trial --

12 THE COURT: Fine. That's fine.

13 MR. SMITH: -- that's pending. And I have got some
14 additional materials and authorities if I could pass them up,
15 and I did provide a copy to counsel this morning of those
16 additional materials.

17 If I may approach?

18 THE COURT: Fine.

19 MR. SMITH: Thanks. I also have an extra copy for
20 your clerk as well.

21 Thank you.

22 Your Honor, the motion to preserve the testimony of
23 two central players in this dispute, Gaston Glock, Sr. who is
24 presently 85 years old and the Plaintiff, Helga Glock, who is
25 currently 79 years old. The filing that we have submitted to

1 the Court includes affidavits and other evidence of record
2 demonstrating that both Mr. Glock and Mrs. Glock have had
3 health issues that have limited their ability to testify in
4 certain proceedings that are pending in Austria, plus also
5 establishing the advanced age. And throughout the briefing,
6 Your Honor, there's been a back and forth about whether these
7 would be trial preservation depositions, whether they should be
8 viewed under the regular discovery depositions and what the
9 Court's power and ability is to indeed preserve that testimony
10 if indeed the Court was inclined to do so.

11 So I think what we have is the issue is we have got
12 two folks that I think it's indisputable are central to this
13 dispute. This dispute is complex, and certainly I don't think
14 -- at least we don't assume -- it's going to be over in a short
15 period of time. One of those witnesses is 85 years old, and
16 one is 79. And both have had illnesses that have prevented
17 them from testifying at times and has been documented.

18 The Plaintiffs believe that the Court has powers to
19 order the depositions of those parties at this time in order to
20 ensure that any evidence they have that's material to this
21 dispute is preserved for the purposes of trial in the event
22 that there is a trial. Defendants seem to believe that the
23 Court does not quite have that power at this time because a
24 complaint has only been filed, there's not been a motion to
25 dismiss filed yet, and no answer has been filed yet. The Court

1 hasn't made those initial determinations. And the parties
2 haven't had a Rule 26(f) conference yet to talk about it; and,
3 therefore, discovery hasn't officially begun under Rule 26.

4 The Plaintiff's perspective on that, Your Honor, is
5 that if you have got material witnesses who have got material
6 evidence and there's reason to believe that that testimony
7 might not be present at the time that it's needed the Court has
8 broad discretion and the power to make a decision of whether it
9 makes sense to order those depositions. And at that point, the
10 Court would, of course, need to weigh the prejudice and
11 imposition to the Defendants against the benefit of potentially
12 -- of preserving that evidence.

13 And in thinking about the position that has been
14 cited in the opposition paper, primarily that it would be
15 unfair because a motion to dismiss hasn't been filed, you know,
16 I thought to look at two separate things that are not mentioned
17 in our reply brief that I know we filed yesterday; and I
18 provided these three authorities just to counsel this morning.
19 One of them is Rule 27; and Rule 27 is a provision of the
20 Federal Rules of Civil Procedure, Your Honor, that is entitled
21 Depositions to Perpetuate Testimony. And that particular
22 provision and rule enables the Court in the filing of a mere
23 petition to order depositions to be taken even though a matter
24 has not even been filed.

25 And when we are talking about the potential prejudice

1 in this instance where there's been an extensive complaint
2 already filed and it is of record, the Rule 27 deposition would
3 actually occur before any complaint has been filed, before any
4 allegations have been pled and before any causes of action have
5 actually been raised. And the courts that have interpreted
6 Rule 27 and applied it have actually done it in two ways. The
7 majority -- the majority of times that it's been applied in our
8 view are instances where a person is aged and/or sick and you
9 need to preserve the testimony, or there has also been times
10 when the court has actually granted it because there's some
11 additional information that may be needed in order to file a
12 pleading and satisfy Rule 11.

13 Our view, Your Honor, then is that in a circumstance
14 where we have a pending case and the Court is -- has a pleading
15 in front of it and there's a concern that there could be an
16 unfair prejudice we would submit to the Court that the
17 prejudice and potential prejudice in a Rule 27 situation is far
18 greater because there's no complaint even filed. And there's
19 also some discussion in the response paper as to the proper
20 standard the Court should use. I believe the term used was --
21 and without citation there is terms such as exigent
22 circumstances or immediate harm. And we didn't see where those
23 standards came in under either Rule 32 or Rule 27, and there
24 was no citation to those standards.

25 But it did make me think, well, I suspect the Court

1 would want to look to a standard. Well, in Rule 27 which is a
2 provision that enables the Court to perpetuate testimony before
3 an action has been filed, in the rule itself, Rule 27,
4 Subsection (a)(3), it states, "If satisfied that perpetuating
5 the testimony may prevent a failure or delay of justice, the
6 Court must issue an order." And that is (a)(3) of Rule 27.

7 So in considering that, perhaps, you know, maybe
8 analogizing a Rule 27 deposition which is a deposition to
9 perpetuate testimony, preserve it in the event someone is ill
10 or elderly and the situation we find ourselves in now which is
11 less prejudicial because we actually have a complaint filed,
12 the Court may consider reviewing that testimony of whether --
13 reviewing that standard as preventing a failure or delay of
14 justice. If the Court were to look at that standard, one way
15 to phrase the question would be in the circumstance that we are
16 presently in where there has been no motion to dismiss filed, a
17 lengthy complaint that will likely require some considerable
18 time before testimony is actually received, does the Court
19 believe that the testimony of Mr. Glock who is 85 years old and
20 has record evidence of certain illnesses that have prevented or
21 at least impeded his testimony, Mrs. Glock, our client, who is
22 79 years old who we are equally offering up, does the Court
23 believe that ordering that testimony now before motion practice
24 is determined and before discovery begins would prevent a
25 failure or delay of justice.

1 We contend that it would, Your Honor. And the reason
2 is is that if that testimony is not available then it's gone.
3 And we found another case, Your Honor, *Texaco v. Borda*, which
4 is a Third Circuit case from 1967. And that case does not rely
5 on Rule 27, but it cites a case that did rely on Rule 27 which
6 in *Texaco* was a case where it was a civil case and they were
7 being asked to order a deposition at a time when the case was
8 stayed. And in that case, the court, the Third Circuit, in
9 evaluating the trial court's determination made a reference to
10 Rule 27 even though Rule 27, of course, didn't apply in that
11 circumstance because the case had been filed. So, therefore,
12 we think that that could be an appropriate analog to perhaps
13 look at the standard that we just cited at preventing a failure
14 and delay of justice.

15 And in the *Texaco* case, Your Honor -- in the *Texaco*
16 case, it was a civil action that was brought; and there was a
17 pending criminal action. And the court determined that in
18 light of the pending criminal action in an antitrust claim that
19 the court also described as fairly complex and complicated what
20 the court decided to do was to stay the entire civil action.
21 It's not clear from the Third Circuit opinion whether any
22 answers or responsive pleadings had been filed at that stage or
23 whether any motions had been determined, but the civil action
24 was stayed pending the conclusion of the parallel criminal
25 action.

1 The Petitioner/Plaintiff in that matter asked the
2 trial judge to permit a deposition of someone who was 71 years
3 old. And in that instance, Your Honor, there was no evidence
4 of -- at least not in the Third Circuit opinion there was no
5 discussion of any illness and no discussion of any troubles or
6 problems testifying. It was that the witness was 71 years old.
7 And the trial court indicated that it was going to stay the
8 entire action, and the trial court stated that it would not
9 allow the deposition at that time and that if there was any
10 evidence that this 71-year-old witness was ill or sick they
11 could come back to the court and ask the court to amend its
12 stay order.

13 In particular, Plaintiff's counsel had argued that
14 the target deponent was 71 years old. And the trial court
15 said, "It is meaningless to say to me that Mr. Borda" -- who
16 was the proposed deponent -- "is 71 years old. Age standing
17 alone is meaningless to me."

18 Well, the Plaintiffs appealed that and filed a writ
19 of mandamus on both the stay, the overall stay, and also on the
20 trial court's denial of their right to take the deposition.
21 And the appellate court upheld the stay finding that the trial
22 court, of course, enjoys broad discretion and can manage their
23 docket. And the appellate court, the Third Circuit, did not
24 disrupt the trial court's determination that the matter should
25 be stayed pending the outcome of the criminal action.

1 However, with respect to the witness, the court
2 stated as follows: "What has been said brings us to our
3 expressed view that Judge Augelli abused his discretion in
4 denying leave to *Texaco* to take Borda's deposition on his
5 reasoning that age standing alone is meaningless and that it is
6 meaningless to say to me that Mr. Borda is 71 years old. The
7 circumstance that Mr. Borda is 71 years old is quite
8 meaningful. It would be ignoring the facts of life to say that
9 a 71-year-old witness will be available to give his deposition
10 or testimony at an undeterminable future date when a pending
11 criminal antitrust action will have been determined and the
12 trial of a related civil action will subsequently take place.
13 It is a fact of life too that the memory of events already
14 dating back some 11 years grow dim with the inexorable march of
15 time, even on the part of one of the sunny side of the
16 proverbial three score and ten years. It may be noted
17 parenthetically that counsel for Mr. Borda at the hearing of
18 the stay proceedings motion on October 1966 stated in
19 opposition to the motion, 'The Plaintiff, Your Honor, is 71
20 years of age which in my opinion is awfully good reason why the
21 action shouldn't be stayed.'"

22 The court then made reference to a case from 1957
23 from the U.S. Court of Appeals in the District of Columbia
24 which was decided under Rule 27. And in that instance, the
25 citation mentioned that under Rule 27 that court authorized the

1 taking of the deposition of a 74-year-old witness stating that
2 "Mr. Stinnes seeks by this proceeding to perpetuate the
3 testimony of a person who has knowledge of certain events and
4 transactions, many of which took place years ago. There can be
5 no certainty that this testimony will still be available when
6 the controversy is ready for litigation since the witness is at
7 present 74 years of age."

8 In the case cited from the U.S. Court of Appeals for
9 the District of Columbia, Your Honor, and as well as this Third
10 Circuit case, there is no reference to illness. There is
11 merely the age.

12 The court then addressed the trial court's
13 perspective that, well, if the person becomes ill or if there's
14 a problem you can come back to the court and might modify that
15 order at that time. And the Third Circuit stated that the
16 ready answer is that *Texaco* requested such modification and it
17 was denied:

18 "Judge Augelli's indicated view that he would give
19 consideration to a renewed request should Mr. Borda become ill
20 or infirm referred to by the Respondents affords little
21 nourishment to their position. Should Mr. Borda become ill or
22 infirm, such illness or infirmity might well be of such
23 proportion as to make impossible the taking of his deposition."

24 So the *Texaco* case in the Third Circuit, Your Honor,
25 is interesting because, one, it involves a case that was

1 pending and stayed where discovery was not going forward. And
2 in addition, Your Honor, it showed that when asked the question
3 as to whether the stay should be lifted at least as to that
4 particular witness's deposition testimony to preserve it the
5 appellate court in deciding that it should be referenced Rule
6 27.

7 In addition to the *Texaco* case, Your Honor, and in
8 addition to the Rule 27 case, we also handed up to the Court a
9 case called *Delta Quarries and Disposal, Inc.* which was in the
10 Middle District of Pennsylvania. And that case is a case that
11 was decided under Rule 27. And that case is not as
12 illustrative I don't believe as the *Texaco* case, but it's a
13 case where the court at least applied Rule 27. And in that
14 instance, the witness was 57 years old; but they introduced
15 evidence of his illness, and the Court determined that in that
16 instance it would order the deposition testimony prior to the
17 filing of suit.

18 So, Your Honor, we believe that both our affirmative
19 brief as well as our reply brief coupled with an analogy to
20 Rule 27, *Texaco v. Borda* and *Delta Quarries* we believe supports
21 Plaintiff's position that the Court should order a deposition
22 to preserve the testimony of Mr. Gaston Glock who is 85 and as
23 well as our own client, Mrs. Glock, who is 79 to ensure that
24 that testimony and that their knowledge is available later in
25 the proceedings.

1 That's the first question as it relates to our
2 request for the Court to order the testimony. The second piece
3 of it, Your Honor, is that at this point Mr. Glock is not -- is
4 a Defendant who has not been served. So he is not before this
5 Court. So the question then becomes, Your Honor, if the Court
6 were inclined to want to order a preservation deposition how
7 would we go about that. Well, the Defendants believe that the
8 way that we would need to go about that is through the
9 procedure of letters rogatory to serve Mr. Glock in Austria;
10 and that process takes quite a bit of time. As the Court can
11 see, he hasn't yet been served in this case and that process is
12 ongoing. Austria is not a part of the Hague Convention.

13 The Plaintiff, however, does not share that view.
14 The rules permit the Court to order a served entity to produce
15 evidence and such evidence being in the concept of a managing
16 agent. And in this instance, Your Honor, Glock, Inc., the
17 Georgia corporation based in Smyrna, Georgia, and
18 Consultinvest, Inc., a Georgia corporation based in Smyrna,
19 Georgia, are both served and are both before this Court. And
20 the concept of managing agent is a more amorphous concept in
21 which the decisions that have decided it have made clear that
22 the Court should not apply strict rules such as are you an
23 officer, are you an employee. The concept is broader than
24 that.

25 And the courts have had occasion to examine

1 circumstances where a party, corporate party was served and a
2 party in a litigation. Then the other side asked for the Court
3 to order the deposition not through a subpoena but instead
4 through ordering that party to go ahead and produce the
5 evidence which in that instance would be the managing agent for
6 a deposition. And when the courts have said that, Your Honor,
7 they laid out certain standards such as it's not necessarily a
8 question whether the person remains employed at that time. The
9 issue is are their interests aligned.

10 And the question in *Calixto, Calixto v. Watson*, which
11 is out of the Southern District of Florida in 2008, that case
12 is interesting inasmuch, Your Honor, as the target deponent
13 worked for a corporation that was based in the United States
14 whose parent corporation was based in Switzerland. And the
15 court acknowledged that the parties didn't dispute that the
16 individual who they -- was proposed to be deposed and who they
17 had asked for the court to order the corporation to produce was
18 someone who had material information and someone who was
19 involved in the underlying transactions.

20 And I think, Your Honor, based on the complaint and
21 based on the information in our papers we believe it's
22 indisputable that Mr. Gaston Glock, Sr. is central to the
23 issues present here and was the one involved with those issues
24 and in certain circumstances likely will be the only one with
25 knowledge of certain points that are of materiality to the

1 issues before the Court. And in that case, the question was
2 can the court order a former employee of a U.S. corporation to
3 testify as a managing agent. The other wrinkle in *Calixto*,
4 Your Honor, was that that person was not in the United States.
5 That person was in Switzerland.

6 So you have a certain -- a somewhat analogous
7 circumstance where you have a former officer of a U.S.
8 corporation who now lives in Switzerland. And the request was
9 for the district court to order the corporation before it to
10 produce that person. The corporation that was before that
11 court said you can't do that. You need to -- even if you order
12 them as a managing agent which they contend that they were not
13 and the court found that that person indeed was -- but even if
14 you order that, Your Honor, the other party needs to go through
15 the Hague.

16 And what was interesting also in that case is that
17 the former officer of the United States corporation was an
18 employee of a sister company of the parent of the U.S.
19 corporation. And what the court -- how the court described the
20 issue before it was, "The issue before the court is whether a
21 person who was a managing agent of" -- the acronym is
22 W-A-B-O -- "WABO at the time relevant to the subject matter of
23 the case but who has since transferred to a position with a
24 sister company of WABO fits within the definition of managing
25 agent such that the company can be compelled to produce

1 Mr. Burri to testify."

2 And in analyzing that, Your Honor, the court said,
3 "To make such a determination, courts focus on whether the
4 person had power regarding the matters at stake in the
5 litigation and whether the person's interests are still aligned
6 with the corporation." The court found the first factor
7 clearly, that it had the power, that he had the power regarding
8 the matters at stake in the case.

9 "The second factor assesses the extent to which a
10 person's present interests are still aligned with the
11 corporation. Courts attribute managing agent status to persons
12 who no longer have authority over the matters at issue and who
13 no longer hold the position of authority within the corporation
14 so long as those individuals retained some role in the
15 corporation or at least maintained interest consonant with,
16 rather than adverse to, its interests."

17 Because the former employee and managing agent worked
18 for a sister company, the court found that he was a managing
19 agent because he had exercised power during the formation of
20 the agreement and his interests are aligned. Therefore, the
21 court found that the deposition notice under Rule 30(b)(1) was
22 appropriate and that the other party did not need to go through
23 the Hague Convention to secure his attendance at a deposition
24 -- or strike that, Your Honor -- that they found that it was
25 indeed a managing agent and did not need to go through a

1 subpoena process.

2 Going on further, the court stated that the Supreme
3 Court has explained that the statutes of another country do not
4 deprive an American court of the power to order a party subject
5 to its jurisdiction to produce evidence even though that act of
6 production might violate a statute in that foreign entity. And
7 the court determined that because the convention will not
8 facilitate the gathering evidence more effectively than the
9 procedures already in place through the Federal Rules the court
10 ordered the corporation before it to produce that deponent who
11 it found to be both a managing agent and also subject to being
12 produced not through a subpoena or not through going through
13 the Hague.

14 Well, in this instance, Your Honor, we submit that if
15 the Court is inclined to grant the request to preserve trial
16 testimony, if the Court is inclined to believe that the
17 ordering of testimony of Mr. Glock would prevent a failure or
18 delay of justice if indeed the Court believes that Rule 27 is
19 at least a fair reference point, Plaintiff submits that the
20 Court can order Mr. Glock to appear by directing Glock, Inc.
21 and Consultinvest to produce him. And in addition to the fact
22 that in our case as compared to *Calixto* it's not just that
23 Mr. Glock remains an employee of a sister company, Mr. Glock is
24 Gaston Glock of Glock. Mr. Glock as recently as the filing of
25 this past month by the parent company of Glock, Inc. in Austria

1 stated that Mr. Glock is indeed the company's CEO. So
2 Mr. Glock remains according to the filing the CEO of the parent
3 company.

4 And, in particular, the quote that we included in our
5 paper, Your Honor, from the motion that was filed by Glock
6 Ges.M.B.H. who is an unserved Defendant in this case and the
7 parent company of Glock, Inc. -- they served Defendant in this
8 case represented by counsel -- Ges.M.B.H. said that in
9 connection with the motion that was filed as a criticism of
10 what we have filed in this court -- and we have brought this up
11 at our last hearing that there seems to be a penchant for
12 raising defenses and criticisms of what's going on in this
13 court in Austria.

14 Well, in this instance, criticizing the facts that we
15 included about Mr. Glock's poor health in the motion before the
16 Court today, Glock Ges.M.B.H., the Austrian company and parent
17 of which he is CEO, said this: "While doing all of this, the
18 Defendant, Mrs. Glock, knows that Gaston Glock, Sr. is not only
19 a mere CEO of Glock Ges.M.B.H. but also its eponym, founder and
20 its arched symbol in the public perception. This is why
21 Mrs. Glock's allegations in her recent motion published on
22 PACER.gov about Gaston Glock, Sr.'s asserted poor health are
23 harmful to Plaintiff's business and credibility.

24 In addition, Your Honor, we also attached to our
25 filing yesterday an excerpt from the January 2015 -- annual

1 2015 Glock manual. And it's a magazine article, Your Honor.
2 It was a glossy magazine. And in there there's an annual
3 message from the founder and includes a picture of Mr. Gaston
4 Glock as well as his signature. And we also included, Your
5 Honor, a separate piece that was signed by Mr. Glock in that
6 same magazine of this year in his response to the death of
7 Reinhold Hirschheiter who was a former CEO of Glock, Inc.

8 So it would seem to us, Your Honor, far greater than
9 the facts in *Calixto*. And in the other cases we cited about
10 managing agent, it's Plaintiff's position that Mr. Glock as the
11 CEO of Ges.M.B.H. he is still speaking on behalf of all the
12 Glock entities. It is our position, Your Honor, that even
13 though it's not required to prove that he is a managing agent
14 today in order to establish that standard that we believe that
15 Mr. Glock indeed is speaking on behalf of the company. No one
16 is higher than Mr. Glock in that company and that the evidence
17 even saying that he is the arched symbol, founder and eponym,
18 they are saying that right now at the same time they are making
19 allegation in this court that he doesn't satisfy the lower
20 managing agent standard.

21 So, Your Honor, in closing, it is Plaintiff's
22 position that the Court has an opportunity and the ability to
23 order a trial preservation deposition to protect against any
24 loss of evidence as this case progresses by ordering the
25 deposition of Mr. Glock. Mrs. Glock also if the Court were

1 inclined has offered to and is willing to submit to the same
2 proceeding and is willing to come over to the United States to
3 do that. She indeed filed her case here, and she would make
4 herself available here to have a -- be deposed.

5 And in our paper, we indicated, Your Honor, that the
6 right to conduct that examination that we would agree that
7 that's without regard to any waiver of any rights of
8 jurisdiction or venue or any other defenses that the Defendants
9 may wish to raise substantively in this case so that both
10 parties can have their testimony preserved. And it's our view,
11 Your Honor, that if the Court is inclined to do that that
12 clearly the evidence of this case satisfies more than
13 sufficiently the managing agent standard and that the Court
14 could direct either Consultinvest or Glock, Inc. or both to
15 produce Mr. Glock as evidence.

16 And there's one final point, Your Honor. Counsel has
17 also submitted an affidavit from Mr. Guevara who is corporate
18 secretary and counsel for Glock, Inc. indicating that he has no
19 control over Mr. Glock in words to that effect. We'd submit,
20 Your Honor, that in the cases that we have seen and in the
21 standards that we have seen that whether or not they can
22 produce Mr. Glock is not a factor for the Court to consider in
23 determining whether or not he is a managing agent and whether
24 or not that that person can be compelled through the
25 corporations before the Court. It would seem to us, Your

1 Honor, that if that factor became relevant at all it would be
2 if the Court did, in fact, order the deposition of Mr. Glock,
3 did, in fact, order the current Defendants to produce Mr. Glock
4 and that he didn't show up then at that point in connection
5 with a motion to compel or other appropriate motions it would
6 seem that that issue would then become a factual determination.

7 If the Court has -- unless the Court has any
8 questions on that particular motion, that's all we have on that
9 motion.

10 THE COURT: Mr. Doherty?

11 MR. DOHERTY: Good morning, Your Honor.

12 The Plaintiffs -- or excuse me -- the Defendants see
13 things quite differently as I suspect wouldn't surprise the
14 Court. Helga Glock has filed her complaint here in our view
15 seeking to litigate her Austrian divorce in this court, but we
16 are here again now for a second hearing where Ms. Glock does
17 not want to follow the Federal Rules that apply in this court.
18 She first wants to defer the first step in any civil action by
19 having the Court state any consideration of the Defendant's
20 motions to dismiss. So she wants to proceed before she has
21 established and the Court has confirmed that there is any
22 viable claim on which to conduct discovery at all here.

23 So while she puts the Defendants on hold, she wants
24 to rush ahead and have the Court expedite her discovery
25 efforts. We are going to talk in a moment about her requests

1 for documents. But first we have --

2 THE COURT: Now, as I recall, the last time we were
3 here I didn't rule on either side's motion to stay. I didn't
4 rule on the Plaintiff's motion to stay. I didn't rule on the
5 Defendant's motion to stay for international comity.

6 Am I correct or incorrect about that?

7 MR. DOHERTY: You are absolutely correct about that.

8 THE COURT: All right. So both motions are still
9 pending?

10 MR. DOHERTY: Those motions are still pending.

11 THE COURT: All right.

12 MR. DOHERTY: Where we are today in the wake of those
13 motions that are with the Court we have stipulations that Helga
14 Glock has agreed to that have been submitted to the Court and
15 entered as orders providing a briefing schedule for the motion
16 to dismiss that comes after a ruling on the motions to stay.
17 If those go forward -- or excuse me. If those motions are
18 denied, 30 days after that the Defendants will file their
19 motions to dismiss. Those stipulations also defer all
20 discovery in this case.

21 So Ms. Glock has agreed to put off discovery and the
22 Rule 26(f) conference until all that's done. But we are here
23 today with two requests for her to be able to rush ahead with
24 discovery in the interim while the Defendants must wait to file
25 their motions to dismiss.

1 Now, obviously, as the Court noted, we moved to stay
2 based on abstention. And if that doesn't prevail, we will move
3 to dismiss. But if we are going to proceed in this court, the
4 Defendant's position is that Helga Glock should have to
5 litigate according to the rules. And at the most basic level,
6 that means that the Defendants ought to be able to proceed with
7 their case in their motions before she gets the discovery and
8 that she should serve all the Defendants in this case before
9 taking discovery that will then be argued to bind them later in
10 the case. And litigating by the rules means most fundamentally
11 that she shouldn't be allowed to take discovery before she
12 shows that she has a viable claim here. And, finally, she
13 should also adhere to her own stipulations and the Court's
14 orders on the scheduling.

15 Now, Ms. Glock says that these requests are justified
16 by the special circumstances of this case. But it's clear that
17 the discovery she wants to do here, both taking 40 hours of
18 deposition of her ex-husband in Austria and to get her U.S.
19 counsel access to half a million pages of confidential
20 financial records, that's not about preserving testimony;
21 that's about improving the complaint that's already before the
22 Court. I mean, the Plaintiff's position is that she should not
23 have to respond to the Defendant's motions without the benefit
24 of those documents. And, Your Honor, your rules about
25 presenting trial testimony I think are fairly inconsistent with

1 the idea that anyone would get to play 40 hours of trial
2 testimony. The Defendant's perspective, Your Honor, on this is
3 that this is a fishing expedition looking for a claim because
4 Ms. Glock knows that the claim she has is very unlikely to
5 withstand a motion to dismiss.

6 Now, you mentioned the abstention motion. We think
7 that this request for 40 hours of deposition only gives further
8 grounds and confirms the grounds for abstention. Deposing
9 Mr. Glock for 40 hours would be at odds with the Federal Rules
10 which generally provide for 7 once he is a party to the case.
11 You know, deposing an Austrian citizen against his will in
12 Austria is also at odds with Austrian law. As the Plaintiff
13 points out, there are cases that say that it can't be done that
14 way.

15 But Ms. Glock's filings confirm, you know, what is
16 different from every other case that she cites in her brief is
17 that there are multiple proceedings going on between these
18 parties already in Austria. Her filings and what she has put
19 -- the records she has put in front of the Court to confirm the
20 idea that we need to preserve this testimony at all confirm
21 that the Austrian courts are taking testimony from both
22 Mr. Glock and Helga Glock. And that process has been -- the
23 Austrian litigation has been going on for three years. The
24 Austrian courts are, you know, managing the taking of testimony
25 under the appropriate circumstances for these witnesses. They

1 have been engaged in that now for years.

2 For Ms. Glock to come now and ask this Court to throw
3 the never-ending deposition on top of all that imposes the risk
4 of conflicting discovery requirements in those cases,
5 conflicting direction from the judges. It's the very comity
6 problem that our motion to abstain gets at.

7 And our brief cites to a case from the United States
8 Supreme Court, *Societe Nationale Industrielle Aerospatiale*
9 *versus the U.S District Court for the Southern District of*
10 *Iowa*, that warns about this problem in very stark terms. When
11 U.S. litigants try to take discovery from foreign nationals,
12 that imposes comity risks. Now, in some cases, you have to
13 accept those risks because this would be the only litigation.
14 It's the only opportunity to get that. But that is quite
15 simply not the case here. These parties have able teams of
16 lawyers working away in Austria preserving each other's
17 testimony. Therefore, there is no justification to depart from
18 the Federal Rules here.

19 At bottom -- this gets to the documents a little bit,
20 and I will defer most of that conversation. But at bottom what
21 Ms. Glock is trying to do here is litigate her rights as an
22 Austrian spouse, the founder of an Austrian privatstiftung and
23 as the former shareholder in an Austrian company. It's not
24 surprising that those issues are going to be decided by the
25 Austrian courts, and it poses real comity concerns if Ms. Glock

1 comes to this Court and asks this Court to enter different
2 relief for her or supplement that relief in this case.

3 So, again, we think these issues are being litigated
4 there. The testimony is being preserved there to the extent
5 that that's a concern, and we think that this is just yet
6 another reason why the Court should grant the motion for
7 abstention.

8 All right. On the depositions, first and foremost,
9 the briefing before the Court until yesterday talks about Rule
10 32(a) and why Ms. Glock ought to be able to take these
11 preservation depositions under that rule. Until this morning,
12 that was the only rule that Helga Glock wanted to talk about;
13 and she argued that it was a diversion to look to any of the
14 other rules in the Plaintiff's brief.

15 Well, I think we should start with Rule 26(d) because
16 whether Ms. Glock wants to admit it or not she is asking the
17 Court for permission to take discovery before the Rule 26(f)
18 conference and before she stipulated she would in violation of
19 that Rule 26(d). Depositions are a discovery device under the
20 Federal Rules; and, thus, Helga Glock needs the Court 's
21 permission to take any depositions now before the Defendants
22 move to dismiss, before they answer and before the Rule 26(f)
23 conference. If Mrs. Glock is not asking -- if Helga Glock is
24 not asking for relief from Rule 26(d), and her papers to the
25 Court yesterday say that she is not, then there's no way for

1 the Court to grant a motion for depositions which are
2 discovery.

3 Now, there's a tussle in the brief between the
4 parties about whether it makes any difference if it's a
5 discovery deposition or a deposition to preserve testimony for
6 trial. The Federal Rules don't distinguish between those two.
7 *Chrysler International*, an Eleventh Circuit case we have cited
8 in our brief, expressly holds that a district court did not err
9 by treating discovery and trial preservation depositions as the
10 same for purposes of scheduling.

11 Now, in a reply brief, Helga Glock argues, well, that
12 case is just about timing. That's what we are here about today
13 is whether Mrs. Glock will ever be entitled to any depositions
14 and, if so, when is the appropriate time.

15 *Charles versus Wade* is the case that she relies on,
16 but that doesn't help her position here and it doesn't change
17 the analysis. That case involved a request to depose a
18 prisoner which required the Court's permission under Rule
19 30(a). The trial court said no but only because discovery had
20 already closed.

21 The former Fifth Circuit reversed that as an abuse of
22 discretion because the prisoner wasn't going to be able to
23 testify at trial and because the Plaintiff had already
24 interviewed the witness twice in prison, knew what the witness
25 was going to say and had secured the witness's agreement to

1 testify at a trial that was all to take place six weeks later.
2 So there the issue was the only way this testimony will be
3 presented at trial because the witness is in prison is through
4 this deposition, and it's clear it's not a violation of the
5 judge's discovery restraints because we already know what the
6 witness is going to say. So *Charles versus Wade* which is what
7 they rely on principally does not help them here.

8 So in order to get where Helga Glock wants to go,
9 there has to be some reason to justify departing from the
10 Federal Rules; and her filings don't provide the factual basis
11 to expedite these depositions under Rule 26. Again, her
12 filings confirm that the parties are taking testimony in
13 Austria. Her filings again only show that both sides have
14 requested continuances over the three years of litigation
15 involving -- I think it's up to 14 or 15; I have lost count --
16 of the number of Austrian proceedings. But her filings confirm
17 that Mr. Glock gave testimony weeks ago, weeks before her
18 motion in January of this year. So there's nothing beyond
19 speculation about his health that justifies the request to
20 depose her former husband for 40 hours.

21 We have cited the case of *Echols versus Lawton* which
22 is a Southern District of Georgia case where the court refused
23 to take a preservation deposition of a witness whose health was
24 in decline because he had confirmed evidence of Stage 4
25 diabetes. The court there refused that deposition because as

1 in this case the court hadn't ruled on the Defendant's motions
2 to dismiss. *Echols* relied on the well-established policy now
3 of -- and this is, you know, inherent in Rule 12 and Rule 26
4 setting up the way discovery is supposed to happen in the
5 federal courts.

6 There has been a policy decision by the rule-makers
7 and confirmed by the courts. Until the Plaintiff shows that
8 she can state a claim, the Defendant shouldn't be burdened with
9 discovery. And that's particularly important as the Eleventh
10 Circuit has held in *Pelletier* and RICO cases like this one.
11 *Pelletier* is a lengthy, lengthy opinion from Judge Tjoflat in
12 the Eleventh Circuit about all of the mischief that can occur
13 by allowing discovery to begin in a RICO case without careful
14 attention to what might state a claim. That mischief is
15 exactly what Ms. Glock wants to unleash here, and the Court
16 should not allow it because the record just simply doesn't
17 support the request that there is anything exigent here that
18 would require departing from the normal procedure.

19 If there is any risk to testimony here -- and there
20 shouldn't be because these parties again are giving testimony
21 in Austria -- it is because the events in the complaint are
22 ancient. The events in the complaint are from 1985 through the
23 late '90s. Ms. Glock's complaint alleges that these schemes
24 that she now wants to pursue in this court were disclosed in a
25 prosecution in Luxembourg in 2000. If there is any risk that

1 testimony will be lost, it is because the memories of events
2 from the '80s and the '90s will not be as good today as they
3 were in 2000.

4 And what the Court will hear if we ever get to a
5 motion to dismiss in this case is that the Supreme Court has
6 repeatedly held that the statute of limitations in RICO cases
7 must be firmly applied because the treble damage remedy of RICO
8 is only available to a Plaintiff who acts promptly. The law
9 does not allow a Plaintiff to do as Ms. Glock appears to have
10 done here, sit idly by and wait 15 years after these schemes
11 were supposedly disclosed and then file suit talking about RICO
12 conspiracies only after she has been divorced from the
13 Plaintiff. So in our view, Your Honor, this motion and any
14 argument about losing testimony is only further confirmation
15 about why this case should be dismissed, not why Helga Glock
16 should be off to the races on discovery.

17 Now, this morning Ms. Glock has submitted some
18 evidence and some argument -- or, sorry -- some citations and
19 some argument to Rule 27. And Rule 27 which she passed up
20 actually does address the question of preserving deposition
21 testimony, but it doesn't apply here. What counsel did not
22 point the Court to is Rule 27(a)(1)(A). In order to get a
23 deposition to preserve testimony under Rule 27, the petitioner
24 must file a certification and verified petition attesting that
25 she cannot presently bring her claim in the United States.

1 We are here today because Ms. Glock has filed a
2 350-page complaint representing to the Court under the rules
3 and under Rule 11 that she has a claim that she can pursue.
4 Ms. Glock has repeatedly said in her briefs and again to the
5 Court that, Oh, I have a viable claim that I've asserted. That
6 complaint, the filing of that complaint and those assertions
7 mean that Rule 27 is unavailable.

8 And, you know, Your Honor, I have only gotten the
9 citation to Rule 27 this morning; so I am relying on memory
10 here. But my recollection is that there is a binding old Fifth
11 Circuit case, *Shore versus Acands*, 644 F.2d 386, Fifth Circuit,
12 1981, that confirms that requirement for a Rule 27 preservation
13 deposition. And if, you know, Your Honor would like to hear
14 more about Rule 27, we'd be delighted to file a supplemental
15 brief on it.

16 But the short answer is that Rule 27 does not
17 authorize the relief that Helga Glock is seeking here. What it
18 does instead is confirm that she is not entitled to the relief
19 she is seeking here. Rule 27 presents one way to preserve
20 testimony before a complaint is filed, and Rule 30(a)(2) also
21 provides a method for getting a preservation deposition when
22 the party or the witness was in the United States at the time
23 the complaint was filed but is leaving. You can get one there
24 too.

25 Now, the fact that the Federal Rules specifically

1 provide for conditions under which you can get a deposition to
2 preserve evidence and that those conditions are not satisfied
3 here is good evidence that the rules do not support Ms. Glock's
4 request. So in the end, we are left with Rule 32. And in the
5 brief yesterday before the citation to Rule 27, Plaintiff's
6 position was you need only look at Rule 32, Your Honor. That's
7 all this motion is about. Everything else is a distraction.

8 Well, Rule 32 might be relevant if there were a
9 deposition transcript that we had to talk about admitting at
10 trial. That's all that Rule 32 is about, whether or not a
11 deposition that's already been taken can be admitted against
12 the Defendants at trial. We are nowhere near trial, and
13 Ms. Glock is putting the cart before the horse when she says
14 because the deposition I want to take might be admissible you
15 should let me take it in violation of Rule 26(d) and the rest
16 of the rules.

17 The argument about whether or not Rule 32 -- whether
18 Ms. Glock is right that the deposition would be admissible
19 under Rule 32 that is given pretty short shrift in the
20 Plaintiff's briefs, but I think there's some important problems
21 here. Many of the Defendants, as has been acknowledged this
22 morning, haven't been served with the complaint. Helga Smith
23 [sic] says, Oh, don't worry, they all have reasonable notice of
24 this deposition I'm asking for; and if they choose not to show
25 up, it will still be admissible against them as long as they

1 have, you know, reasonable notice and an opportunity to attend.

2 The questions left unanswered are: How are they
3 going to find out about this deposition? How are we going to
4 know whether they had reasonable notice? How are we going to
5 solve those problems of unserved Defendants who weren't at the
6 deposition and who want their own counsel to ask questions?

7 Ms. Glock wants to gloss over those questions by
8 saying, well, these folks are all the same, they'll ask the
9 same questions, Mr. Glock's got lots of counsel. But on the
10 allegations of this complaint, there are clear differences
11 between these Defendants. We have -- I mean, one of the
12 Defendants is a Panama Charlie, a Mr. Ewert, who is sitting in
13 a Luxembourg prison because he was convicted for attempting to
14 assassinate Mr. Glock. It's difficult to imagine two
15 Defendants with more adverse interests than those.

16 Mr. Manown is a pro se Defendant here in Georgia. He
17 has been served. Mr. Manown has also served a motion to
18 dismiss. What Ms. Glock is saying is that Mr. Manown should
19 have to get on a plane, go to Austria, attend this deposition
20 even though he thinks that there's no case against him all so
21 we can preserve his testimony. Mr. Manown is another Defendant
22 that if he doesn't appear he has pled guilty to stealing money
23 from the Glock companies. Once again, we don't have commonalty
24 of interests.

25 And at the most fundamental level, Ms. Glock's

1 complaint alleges that Mr. Glock stole and diverted money from
2 the rest of the Defendants for 30 years. So while it might be
3 okay to cite a case that says, well, when you have a car wreck
4 case about a drunk-driving accident and the passenger files
5 suit and takes a deposition of a witness out of state to use
6 that deposition against the driver when he shows up later on in
7 the case because the passenger and the driver both have the
8 same interests, none of these folks are in the same car. They
9 are not driving in the same direction. They don't have the
10 same issues with each other, against the Plaintiff. These are
11 not problems that can be just wished away by pretending they
12 don't exist.

13 Ms. Glock's indifference -- or let me put it another
14 way. Helga Glock wants to proceed with this deposition come
15 hell or high water regardless of the problems we may have with
16 admissibility later. That says a lot about what we are doing
17 here. This is not to preserve short testimony to be put on at
18 a real trial. Forty hours is not for testimony that you
19 already know what you are going to get. This is a fishing
20 expedition, and 40 hours of deposition for your former husband
21 is the type of tactic you would expect in a divorce case.
22 That's what I think we have here, and that's why we think it's
23 improper.

24 Finally, on the question of managing agent, as
25 counsel for Ms. Glock, I think, very accurately put it, if you

1 want to do this we will find you a way. We submit there's no
2 reason that you should want to do this in this case and that
3 you'd have to walk over or roll over an awful lot of federal
4 rules to get there. But the idea that Mr. Glock can be deposed
5 as the managing agent of the U.S. Defendants that's just a
6 gimmick to try and get around several problems that are in the
7 way of this deposition.

8 Mr. Glock hasn't been -- he's a party, named party;
9 but he hasn't been served with a complaint. He is an Austrian
10 citizen living in Austria. Plaintiff concedes that the law --
11 and we have cited *In Re Austrian Ski Accident* as the case on
12 this that's in our papers. An Austrian resident you have got
13 to go the letters rogatory route to depose one of them. And
14 Mrs. Glock simply hasn't carried her burden to prove that
15 Mr. Glock is a managing agent of any U.S. entity today.

16 Now, the Austrian filing she attaches to the reply
17 brief represents that Mr. -- and we have heard a lot about that
18 this morning -- that Mr. Glock represents in an Austrian filing
19 Mr. Glock founded the Austrian company Glock Ges.M.B.H. That
20 is not the U.S. company. The fact that he has a role there and
21 that he continues to work in Austria does not mean that he is a
22 managing agent of the U.S. subsidiaries here.

23 And one sidenote. You have already heard from both
24 sides I will confess a lot of they are telling you this one
25 thing here, Your Honor, and they are saying something different

1 over in Austria. And for that parallel litigation between the
2 parties in those two countries, if there is no abstention and
3 we proceed we are in for many, many years of comparing Austrian
4 filings and this court filings. And, again, we think that's
5 unnecessary.

6 But Glock Ges.M.B.H. is another unserved Defendant.
7 So to the extent his position at that company gives anybody any
8 right to depose him, that's another unserved Defendant. That's
9 not the U.S. companies. There's no proof submitted that
10 Mr. Glock is currently or has been anytime in recent memory a
11 managing agent of the U.S. companies. I mean, for example,
12 Jack Welch, he is still a symbol of G.E. to many; but he can't
13 be deposed as a managing agent of that company today.

14 The other evidence that has been submitted with the
15 reply brief is similarly very weak. The fact that Mr. Glock
16 once used some of the same lawyers who represented Glock, Inc.
17 and Consultinvest in 2007, that doesn't make him a managing
18 agent today. His indirect ownership of any shares in this
19 company, that doesn't make him a managing agent today.

20 But what you do have in front of you, Your Honor, is
21 an affidavit from the corporate -- the vice president,
22 secretary, general counsel of Glock, Inc. and the secretary of
23 Consultinvest. And it provides very matter-of-factly that
24 Mr. Glock has not been an officer, director of Glock, Inc.
25 since at least May 2003. He is not responsible for managing

1 any day-to-day operations there, and he hasn't had that
2 responsibility for years.

3 In the reply brief, Helga Glock wants to attack that
4 saying that, well, your declarant, Mr. Guevara, hasn't been --
5 wasn't at Glock before 1999 so you can't tell me what positions
6 he had beforehand. Well, even if we spot them that point --
7 and I don't think we have to do that -- that means Mr. Glock
8 hasn't been a managing agent of Glock, Inc. and Consultinvest
9 for more than 15 years.

10 My memory of this may be a little off, Your Honor.
11 But if I recall, before you were confirmed in July of 1997,
12 Your Honor, you were in private practice. By Ms. Glock's
13 logic, a Plaintiff can depose you as a managing agent of that
14 firm today.

15 That's not what the law is. Absolutely not.

16 The last point that Ms. Glock made on this is that
17 what matters is that he was a managing agent at the time. They
18 have cited a case that suggests that when there is a modest
19 difference in time, the *Calixto* case, that the Court look past
20 that. That's what they did in *Calixto*. I mean, that's what
21 the result was. But that doesn't mean it should be the result
22 here.

23 We are talking decades of time that have passed since
24 Mr. Glock had any role that would approach being a managing
25 agent of these U.S. companies. He is not an employee, not a

1 director, not a board member, hasn't been around the Georgia
2 facilities.

3 And the *In Re Honda* litigation case that we cited in
4 our brief confirms that the critical question is: Can the
5 party in front of the Court that's going to be ordered to
6 produce a witness, can they make him show up and does he still
7 have interests that align him with the company?

8 Now, there are cases where that is true where the
9 company can produce the witness. But this is not that case.
10 What you have in your affidavit -- and this is uncontested --
11 is that neither Glock, Inc. nor Consultinvest has the right
12 ability, power or authority to compel Mr. Glock to submit to a
13 deposition on their behalf.

14 And now we are getting at what Ms. Glock may really
15 be after here, and this is sort of the last thing that her
16 counsel said. But we can revisit all that after you order them
17 to produce and he doesn't show up. So what we are really after
18 here is an order from the Court against these U.S. Defendants
19 -- having a lot of trouble getting those European Defendants
20 served; but if you can just give these U.S. Defendants an order
21 that I know they can't comply with, Your Honor, we will come
22 back and see you about it then.

23 I mean, again, that's just the wrong place to be in
24 this case. If the Court is going to expedite anything here,
25 and I would hope that it would be the motion to abstain, but if

1 you are going to expedite anything it shouldn't be -- after
2 that it shouldn't be discovery. It should be the motion to
3 dismiss.

4 Unless you have any questions, I am going to sit
5 down.

6 THE COURT: All right, Mr. Doherty.

7 All right. I am going to deny the motion to take
8 depositions from Mr. Glock for preservation of evidence. At
9 this point in time, it appears to me that what the Plaintiff is
10 really seeking is discovery from Mr. Glock and that would be
11 premature at this point in time. The Eleventh Circuit has made
12 it very clear in the *Pelletier* case and others that discovery
13 is not to begin in a RICO case until the Plaintiff has
14 demonstrated that she, in fact, has a viable claim. Obviously,
15 in a case like this, the Defendants are going to file motions
16 to dismiss at some point in time. And then if the Plaintiff's
17 case survives the motions to dismiss, then discovery will
18 begin.

19 I agree with the Plaintiffs that there are
20 circumstances in which a deposition may be taken for
21 preservation of evidence, but that circumstance has not been
22 demonstrated here in my judgment. There's ongoing litigation
23 in the Austrian courts. Evidence is being taken in those
24 courts. And I am not persuaded that that evidence if this case
25 goes forward might not be available to be used here. And I am

1 particularly not willing to order Mr. Glock to appear for 40
2 hours of deposition when he has not even been served in the
3 case and other important Defendants such as the Austrian Glock
4 company have not been served and who would have an interest in
5 participating in the deposition that may be very, very
6 different from that of Mr. Glock and his attorneys.

7 And, finally, I would say that I'm not prepared to
8 order the Defendants to participate in a
9 preservation-of-evidence deposition of Mrs. Glock without them
10 having had the opportunity to engage in discovery before they
11 are required to cross-examine her in a deposition that would be
12 intended for a substitute for her testimony at trial under
13 certain circumstances. So for those reasons, I'm going to deny
14 the motion.

15 Mr. Doherty, if you will prepare a written order
16 summarizing those rulings on the motion and get Mr. Smith's
17 approval as to form and present it to me, I'll sign it.

18 And I also don't think that I can order the American
19 companies to produce Mr. Glock as a managing agent. It's clear
20 to me that he is not and hasn't been for years. So for that
21 additional reason, I deny the motion.

22 All right. Mr. Smith, next is the motion for
23 discovery of the *In Re HMG* production.

24 MR. SMITH: Yes, Your Honor.

25 The *In Re HMG* production discovery issue is slightly

1 different than the discovery ruling that the Court just made on
2 our request to take trial-preservation depositions. The reason
3 that that difference is there is that the materials that we are
4 seeking are already in the possession of our client. And we
5 are not -- we are in the position and understood that when we
6 filed this case, Your Honor, certainly from a matter of
7 strategy all the shots that came to us this morning from
8 Mr. Doherty when you file a case and then ask for documents
9 it's -- I'm not taking anything away from his lawyering -- but
10 not a surprise that we would hear, Well, you've just filed this
11 case that you don't believe in and need other things. So we
12 certainly anticipated that we would hear the arguments that we
13 have heard this morning from counsel.

14 The issue, however, that we found ourselves in, Your
15 Honor, is that our client has possession of 500,000 pages of
16 material that I am not allowed to see. I personally as her
17 lawyer and the lawyers representing her in this RICO matter
18 can't see it. So to the extent that there is information in
19 those materials that would serve to put her on notice of
20 something where there would be a statute of limitations
21 analysis or would serve to provide her information of a claim
22 or an additional Defendant, we can't actually review that. And
23 I suspect the Court could appreciate how uncomfortable it is as
24 counsel to bring a significant action that required significant
25 effort and diligence to bring without being allowed to look at

1 500,000 pages that are in their client's physical possession.

2 The ruling from the magistrate court in that matter
3 was favorable to us. The district court reversed that decision
4 and now that -- I believe the opening brief has now been filed
5 in the Eleventh Circuit as to whether the ruling was correct
6 that counsel for Mrs. Glock cannot be added to the protective
7 order in connection with the 1782 production.

8 So now before your Court, Your Honor, this Court has
9 the ability to order discovery. And even under Rule 26 we are
10 not looking to violate anything, Your Honor. We are not asking
11 this Court to violate rules. We are not trying to violate
12 rules. Rule 26 permits the Court to issue an order if the
13 Court feels it's appropriate to allow discovery at any phase.
14 And what we believe, Your Honor, is that in this instance where
15 an effort was made to have Mrs. Glock's counsel added to the
16 protective order in the *In Re* case that matter is on appeal.

17 Now we are before this court. And our request in
18 this court to remedy the peculiar circumstance where a client
19 has a volume of material that we believe would be directly
20 relevant but we can't look at at the early stage of the
21 proceeding before motion practice, before other matters occur
22 in this case where, for example, Your Honor, if we were to
23 later be able to have access to those documents, if motions to
24 dismiss were filed and denied and if we are proceeding and we
25 have taken discovery, we have exchanged documents and this

1 Court were to deny our ability now to see access to those
2 materials but the motion to dismiss were denied, and then let's
3 assume this Eleventh Circuit rules in our favor and says yes,
4 you should have been added to that protective order, we would
5 then have access to materials that could give rise to claims
6 that should be in this case. We would need to seek the Court's
7 permission at that time to amend the complaint if it's
8 necessary.

9 And, you know, I would represent to the Court that
10 this is not in any way an effort to say let's file a case that
11 we don't think can withstand just so we can use it to go get
12 discovery. And I recognize the Court's prior ruling, and we
13 were prepared in connection with the deposition to say you can
14 seal that deposition and not let us use it. That was about
15 preservation.

16 This is about efficiency and about being able to
17 actually view documents that are in our client's possession for
18 which our client is deemed to have knowledge of. And we
19 believe that at this point, Your Honor, the prejudice that the
20 Court just evaluated with respect to our request to take the
21 deposition, the prejudice that was, you know, described by
22 Mr. Doherty isn't present in this instance because the
23 materials are already in the possession of our client.

24 So the Court could simply order in this instance that
25 discovery be had, that that discovery be a production by the

1 Defendants, Glock, Inc. and Consultinvest, of those certain
2 500,000 pages specifically that Mrs. Glock has in her
3 possession and that the Court will deem those materials
4 produced in this case such that counsel for Mrs. Glock in this
5 case can look at them and review them as appropriate. That
6 would avoid any prejudice to either of the Defendants of having
7 to go through the process of production.

8 Mrs. Glock then also asked, Your Honor, that in the
9 event the Court was inclined to let us view those materials
10 that the Court would consider a stay such that we be able to
11 view them and then come back to the Court with whether or not
12 we believe any amendment, if at all, is necessary and, if so,
13 the time. And we did cite authority in those papers, Your
14 Honor, where large amounts of material were provided to counsel
15 during an active case and the court was willing in certain
16 circumstances to allow a stay for time to review.

17 So our request was simply if the Court would be
18 inclined to grant that discovery at this stage, deem it
19 produced so that they don't actually -- Defendants aren't
20 actually having to provide the production. That would cure the
21 problem where we have filed a complaint without full access to
22 information in our client's possession and where there could be
23 claims that are either tolled by the statute of limitations at
24 this point or where it started or that other Defendants should
25 be added. And then we'd be able to do whatever is appropriate,

1 perhaps nothing. Perhaps there would be no amendment to the
2 complaint at all. Perhaps there would be. But at least the
3 knowledge of her lawyers is coextensive with that of the
4 client.

5 And it's difficult, Your Honor, to conceive of
6 another circumstance where a lawyer is in a case and the
7 knowledge of that lawyer is not coextensive with his or her
8 client on matters material to the case itself. And, Your
9 Honor, I also would just submit to the Court that this is not a
10 way to do an end-around the 1782 ruling. We want access to the
11 documents and believe we should have access to the materials
12 our client has. The 1782 ruling which is on appeal at this
13 time is a question of whether or not documents that were
14 obtained pursuant to Section 1782 whether there is any kind of
15 inherent restriction on those materials such that they can or
16 cannot be provided, and that is on appeal.

17 In this instance, it's a discovery question. And our
18 question is in this instance where our client has materials and
19 has knowledge and we are in that position of not knowing
20 everything our client knows and where that could be remedied
21 without any prejudice to the Defendants in this case as far as
22 time and production and effort before the complaint has been
23 tested we would ask that the Court order that production in the
24 manner that we described so that we can view everything our
25 client has.

1 THE COURT: All right, Mr. Smith.

2 Mr. Doherty?

3 MR. DOHERTY: Thank you, Your Honor.

4 I'm mindful that we have been here before and plowed
5 this field already, so I am really going to try to be brief and
6 really address the questions the Court had for me on this issue
7 last time. The first question was the Court's observation that
8 Judge Pannell ruled that nothing in his order would preclude
9 Helga Glock from seeking the documents in the U.S. RICO action,
10 seeking them in discovery.

11 Well, that's not exactly how they have gone about it
12 here. We don't have a Rule 34 document request or anything
13 like that. But Judge Pannell's observation that Ms. Glock can
14 pursue these documents in discovery runs us right back to the
15 point that Your Honor has just made in the ruling on the
16 depositions. The Eleventh Circuit decision in *Pelletier* about
17 the mischief of discovery before pruning the RICO pleadings
18 applies with equal force there if we are dealing with this
19 matter as an issue of discovery. And if we are to follow
20 normal discovery procedures, then that means Ms. Glock should
21 have to survive a motion to dismiss before she gets to conduct
22 discovery.

23 Now, that sort of takes care of what Judge Pannell
24 left open to Ms. Glock. But what we have here today, and as
25 counsel acknowledges, we are not asking the Defendants to

1 produce these documents. We haven't sent a Rule 34 request.
2 We just want the documents we have deemed produced here. But
3 that really is a request to get around the ruling in Judge
4 Pannell's court that having gotten these documents under 1782,
5 having agreed to a protective order that Judge Pannell read to
6 limit the use of those documents to the identified Austrian
7 proceedings, you can't share those with your counsel by virtue
8 of 1782 and the protective order.

9 Absent discovery requests, what Ms. Glock is doing is
10 asking for an end-around or simply another answer to the
11 question of can my U.S. counsel see these documents even though
12 there's a protective order that says he can't and even though
13 Judge Pannell has confirmed that and even though all of that is
14 now up before the Eleventh Circuit. And that gets to the
15 second question that Your Honor had was about whether or not
16 the appeal deprived this Court of jurisdiction to award her the
17 documents.

18 And, again, having looked back at that, the *RES-GA*
19 *Cobblestone* case we have cited in our brief on this I think
20 it's pretty clear on the idea that if an issue is up before the
21 Eleventh Circuit it should not be addressed here in the
22 district court --

23 THE COURT: Well, I think that is true if it's in the
24 same case; but I'm not really persuaded, Mr. Doherty, that that
25 rule strictly applies where you got one case over here before

1 Judge Pannell that's gone up to the Eleventh Circuit and then
2 you got a separate case in front of me involving the same
3 parties in a related dispute but it's a separate case. The
4 Eleventh Circuit doesn't have jurisdiction of this case, Helga
5 Glock versus Gaston Glock.

6 Nevertheless, I'm bothered by the idea that the
7 Plaintiff is asking me to overturn Judge Pannell's opinion that
8 he would restrict the production of those documents to
9 Mrs. Glock's Austrian lawyers.

10 I mean, can I say something that or can I do
11 something that is inconsistent with that?

12 Yes.

13 Do I want to do that?

14 No.

15 Go ahead, Mr. Doherty.

16 MR. DOHERTY: Well, and, I mean, I appreciate those
17 points. I mean, a couple of reactions. Part of the reason
18 that the Defendants suggest that we have a jurisdictional
19 problem here is in the way that this case has arrived, the way
20 that the Plaintiff has brought it. She has appealed in the one
21 case the question of the ruling on 1782 and the protective
22 order. And instead of following Judge Pannell's suggestion
23 that she pursue discovery which would run into the Rule 26(d)
24 *Pelletier* problems that we have spent a lot of time talking
25 about this morning, she has tried another way that really runs

1 into the teeth of Judge Pannell's order.

2 And Your Honor is correct in reading our case the
3 decisions that the district court made for which it didn't have
4 jurisdiction were in the same case. We didn't have two cases
5 like Your Honor has outlined here. But think of the problems
6 that will multiply if what we tell litigants is if you don't
7 like the answer you got the first time you can take your
8 chances on appeal, but go ahead and run down the hall and see
9 if you can get another answer from another court.

10 I have four little children, and they have learned
11 that trick between their mom and their dad. You know, if you
12 don't look at the answer you like the first time, they are all
13 pretty good about getting the other one to try and consider it
14 again. I think that's just a recipe for disaster and I think
15 it doesn't solve the problem here, Your Honor.

16 Unless you have any other questions, I am prepared to
17 sit down.

18 THE COURT: All right. I'm going to deny the motion
19 for discovery of the *In Re HMG* production materials without
20 prejudice, and I will state that if the Plaintiff's case
21 survives a motion to dismiss and discovery begins and the
22 Plaintiff serves on the Defendants a proper document request
23 for these materials I will order them to be produced. I think
24 that is consistent with Judge Pannell's order. It is
25 consistent with the rulings I have made so far that we don't

1 begin discovery until the case survives a motion to dismiss,
2 and it's consistent with the way we generally do business in
3 this court.

4 And I am not trying to tell you what to do,
5 Mr. Smith. You can continue to pursue the appeal if that's
6 what your client wants to. But if your case survives, you are
7 going to get the documents.

8 MR. SMITH: Yes, sir.

9 THE COURT: If you will prepare a written order
10 again, Mr. Doherty, present it to me, I will be -- get
11 Mr. Smith's approval as to form, present it to me, I will sign
12 it.

13 MR. DOHERTY: Absolutely, Your Honor. Thank you.

14 THE COURT: All right. That concludes the hearing.
15 Thank you very much, gentlemen. Court's in recess
16 until further order.

17 (Proceedings adjourned at 12:17 p.m.)
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C E R T I F I C A T E

UNITED STATES DISTRICT COURT:
NORTHERN DISTRICT OF GEORGIA:

I hereby certify that the foregoing pages, 1 through 50, are a true and correct copy of the proceedings in the case aforesaid.

This the 1st day of April, 2015.

Susan C. Baker, RMR, CRR
Official Court Reporter
United States District Court